



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL **FROM:** Richard Doyle

SUBJECT: SEE BELOW

DATE: June 8, 2010

SUBJECT: SETTLEMENT WITH FIRE EMPLOYEES RE: FAIR LABOR STANDARDS ACT OVERTIME CLAIMS

RECOMMENDATION

Approve a settlement and authorize the City Attorney to execute a Settlement Agreement to settle two federal Fair Labor Standards Act ("FLSA") lawsuits brought by San Jose fire employees in which (1) the fire employees will be paid back wages in an amount to be determined by recalculating each participating fire employees' overtime pay which they are due, if any, consistent with the proposed settlement agreement, approved by the federal court as fair and reasonable; (2) the City will calculate overtime pay prospectively pursuant to the attached proposed settlement agreement beginning the first pay period that commences after July 1, 2010; and (3) the City will pay attorneys' fees and costs for both lawsuits, in a total amount of one hundred five thousand dollars (\$105,000), as considered by the City Council during Closed Session on March 30, 2010.

OUTCOME

Approval of this action will allow the City to settle two federal FLSA lawsuits on terms that the United States District Court has deemed to be fair and reasonable.

BACKGROUND

The underlying matters consist of two separate cases filed by fire personnel under the FLSA: *Juan Diaz, Keith Keesling, Christopher Murphy, Gary Weekley, Karen Allyn, and other employees similarly situated v. City of San Jose* ("Diaz Case"), and *Jeffrey Welch, Glen Bishop, Mitchell Witsinski, Robert Culbertson, and other employees similarly situated v. City of San Jose* ("Welch Case"). The *Diaz* case was filed on December 20, 2007 and the *Welch* case was filed on April 24, 2008.

Both cases allege that over the past several years, the City has underpaid overtime wages pursuant to the FLSA. The *Diaz* case was brought by firefighters who worked

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administrative jobs (40 hr/week positions) and the *Welch* case was brought by firefighters who have suppression jobs (56 hr/week positions). The *Diaz* case has a total of 357 plaintiffs and the *Welch* case has a total of 779 plaintiffs. Some employees claim to have been assigned to both administrative jobs and suppression jobs during the relevant period, and so are plaintiffs in both cases. There are a total of 793 individual fire employees participating in the two cases.

Fire employee pay is subject to complicated regulations under the FLSA. The situation is made even more complicated by the many different "premium pays" to which fire employees are entitled, as well as potentially overlapping provisions under the bargaining unit's Memorandum of Agreement. The parties disputed the exact nature of any underpayments, but agreed to resolve this dispute by defining how overtime would be calculated both retrospectively and prospectively.

The settlement of this matter involves a recalculation of each Plaintiff's payroll back to April 24, 2006 for those working suppression shifts, and back to September 21, 2005 for those working administrative shifts. In order to account for the risk of a doubling of a damages award under the FLSA's "liquidated damages" provisions, the City has agreed to increase the retrospective payments by 50%, and to pay attorneys' fees of \$105,000.00.

ANALYSIS

The proposed settlement was approved and deemed "fair and reasonable" by the United States District Court earlier this month, a finding that is required by the FLSA. The settlement provides certainty on this complicated issue and avoids the risks of trial and potential greater liability.

PUBLIC OUTREACH/INTEREST

This memorandum and settlement agreement are posted on the City's website for the June 22, 2010 Council Agenda.

COORDINATION

The settlement has been coordinated with the Fire Department, the Office of Employee Relations, and the Finance Department.

COST SUMMARY/IMPLICATIONS

Calculations of the retrospective payments will vary widely among the individual Plaintiffs, with some receiving no compensation at all and others receiving thousands of dollars. In aggregate, Finance staff has calculated the settlement expenditure to be approximately \$960,000 for the retrospective payments plus the additional 50% payment of approximately \$480,000, making the total payment to the individual plaintiffs

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approximately \$1,440,000. In addition, staff estimates that the City will need to make a retirement contribution of approximately \$93,000 for the retrospective payments. These expenditures will be paid from the Fire Department's personal services budget. The amount of attorneys' fees will be a fixed sum of \$105,000.00 and will be paid out of the General Liability Claims appropriation.

BUDGET REFERENCE

Fund #	Appn #	Appn. Name	Total Appn.	Amount for Settlement	2009-2010 Adopted Operating Budget (Page)	Last Budget Action (Date, Ord. No.)
001	0541	Personal Services - Fire Department	\$147,520,978	\$1,533,000	VIII - 100	02/09/10
001	0018	General Liability Claims	\$11,650,000	\$105,000	IX - 31	06/23/09

CEQA

Not a project, PP10-069 (b), personnel related decisions.

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City Attorney


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For questions please contact Richard Doyle, City Attorney at (408) 535-1900.